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SOME QUESTIONS UNDER S. 20 OF THE LIMITATION ACT.

(Continued from 32 M. L. J. p., 11.)

Difficult questions sometimes arise under S. 20 where properties comprised in a mortgage pass into the hands of different persons and the mortgagee relies on payment by one of them to keep alive his claim against the rest. The simplest case (a) is that of a mortgagor who may assign away the equity of redemption in some of the mortgaged properties. Some complication may arise if (b) as between the mortgagor and his transferee there should be an express agreement that one of them alone should be responsible for the *whole* debt, and more still if (c) a third party, without acquiring any interest in the mortgaged properties, contracts with the mortgagor (for some other consideration) to pay up the whole or any portion of the mortgage debt. Again (d) some of the mortgaged properties may be assigned in parcels to more than one purchaser or (e) the mortgagor may retain none of the properties at all in his hands. The mortgaged properties may (f) get parcelled out between the heirs and devisees of the mortgagor or between different devisees; and lastly, in partitions or other family arrangements among joint family members or coheirs, the mortgaged properties may be allotted to one or some (g) either on the understanding that he or they should pay the *whole* debt or (h) with a provision for payment of the debt by somebody else. What is the effect, in these several instances, of a part payment or payment of interest, by one or another of the parties concerned, in preventing the running of time as regards the rest?

Krishna Chandra v. *Bhairab Chandra*[1] and *Domilal Sahu* v. *Roshan Dobay*[2] furnish instances of the first type. The court there held that a payment by the mortgagor, after the assignment, would save limitation even as against the assignee; and in the earlier of these cases, the court went further and laid down that

1. (1905) I. L. R. 32 C. 1077. 2. (1906) I. L. R. 33 C. 1278.

an 'acknowledgment' by the mortgagor *after* he had sold away some of the mortgaged properties would suffice to save time as against the purchaser also. This last point seems to us open to question (cf. per Mookerjee, J. in *Surjiram* v. *Brahma Deo* [1] and *Velayuda* v. *Narasimha* [2]). But as regards the effect of 'payment' the position appears free from doubt (see also *Hem Chandra* v. *Purnachandra* [3]) and it is also supported by the principle of the decision of the House of Lords in *Chinnery* v. *Evans* [4]. There has been some discussion in England as to the exact basis and scope of this decision of the House of Lords and some difficulty has been caused by the Judgment of the Court of Appeal in *Newbould* v. *Smith* [5]. In *Domi Lal Sahu's case,* the learned Judges rest their conclusion on the language of the Limitation Act and get rid of *Newbould* v. *Smith* [5] by saying that they were only concerned with the language of the Indian Statute. In *Newbould* v. *Smith* [5] the court laid stress on the fact that at the time of the alleged payment of interest the mortgagor had completely parted with his interest in the whole property, this will be class (e) *supra*—and as a matter of fact even the remedy on the personal covenant seems to have become barred; but even so, the House of Lords, when the case went up on appeal, desired expressly to leave the point open. The case has not been generally accepted or followed even in England. *Chinnery* v. *Evans* [4] has been treated as a leading case and the ratio of the decision has been taken to be that, as the rule in respect of the effect of payment in saving limitation is based on the inference of an 'acknowledgment of liability', the payment to have that effect must have been made by a person 'liable to pay.' This is substantially the language of S. 20 of our Act; but the theory of inferential acknowledgment or implied promise (as it is sometimes put) ought not to be taken too literally, for on that footing, a payment by one person cannot be held to affect another except under circumstances warranting an inference of *agency*. This was just the difficulty in *Newbould* v. *Smith* [1]. Other English cases have escaped the difficulty by a rather literal application of the theory of 'implied' agency but that is not possible in India, in view of the terms of Ss. 19 & 20 of the Limitation Act.

1. (1905) 1 C. L. J. 337.
2. (1916) 32 M. L. J. 263.
3. (1914) 22 I. C. 510.
4. (1864) 11 H. L. C. 115.
5. (1886) 33 Ch D. 127.

A further question is what must be the nature of the liability of the person who makes the payment, should it be of the same kind or origin as that of the original debtor or other person sought to be bound thereby? Thus a mortgagor may be 'personally' liable for the mortgage debt but not one who purchases the property from him. Can a payment by the purchaser be relied on to extend time in respect of the 'personal' liability of the mortgagor? Again, should there necessarily subsist any particular legal relation between the creditor and the person paying, so as to give the former a right of *direct recourse* against the latter? In other words, can a payment of interest or part payment by one person furnish a fresh starting point for an action in which the person paying *cannot himself be made liable.* To these questions, reported decisions in India do not sufficiently help us to give a decided answer.

Quite recently, in *Brajendrakishore Roy* v. *Hindustan Co-operative Insurance Co.* [1]—which by the way, was a case of principal and surety—it was indicated as necessary condition for the application of S. 20 to the class of cases now under discussion, that the debt or liability in question must be *single*, though different persons may be or have become liable in respect thereof in different ways and degrees or at different times. This may in most cases be predicated of the mortgage debt. But the point as to which there is room for doubt even here is as to the relation of the creditor to the particular liability in acknowledgment of which the payment must be deemed to be made. Suppose, as between the mortgagor and his assignee there is an 'express' agreement that the mortgagor and the properties in his hands should be solely responsible for the mortgage debt. No doubt this would not of itself affect the remedies of the mortgagee against the properties in the hands of the assignee. But when in pursuance of such an agreement the mortgagor makes a payment, it may well be argued that the mortgagor acts for himself and not as representing the mortgaged estate or its other owners and that therefore, the payment cannot save limitation as against the assignee if the true theory be that for this purpose the payment must be capable of being regarded as made 'for the other' or supporting an inference of an acknowledgment of liability by the other. As against this, there is the consideration stated in *Chinnery* v. *Evans* [2] that the mortgagee

1. (1917) I. L. R. 44 C. 978. 2. (1864) 11 H. L. C. 115.

naturally looks to the mortgagor for payment and when the latter goes on making payments, the mortgagee should not so far as his right to proceed against the security is concerned, be affected by any arrangement behind his back as between the parties interested in the equity of redemption. But the force of this last mentioned argument will be very little in cases where the mortgagee has knowledge of any special arrangements between the mortgagor and his assignee. The same observations would apply to the other alternative of payments by the mortgagor, in spite of an arrangement between the mortgagor and his assignee that the *latter* should bear the whole burden of the debt. Where however a payment is made by the assignee and that is relied on as furnishing a fresh starting point even as against the mortgagor, it can be argued with some force that the assignee is not the person primarily liable, that if, on the score of payments by him, the mortgagee chooses to leave the mortgagor alone till the period of limitation expires as against the latter, there are no special considerations, founded on what may be described as the ordinary way of the world in favour of the view that the claim against the mortgagor must nevertheless be regarded as kept alive.

The question presents even greater difficulty if the payment is made by a person who, whether personally or by means of some property in his possession, is *not directly liable to the creditor* for the debt to which the suit relates. A familiar case of this kind is that in which a debtor selling his properties (unconnected with the mortgage) directs the vendee to pay a portion of the sale price to the mortgagee. Will there be any difference between cases in which the vendee is directed to pay the *whole* debt and those in which the direction relates only to a part of the debt? Is it any material circumstance whether with reference to the facts of each particular case, the court is or is not able to hold that the creditor has a direct right of action against the vendee. In *Alagappa* v. *Subramaniya* [1], Wallis and Sadasiva Iyer, JJ. assumed that the question of limitation must be decided on the footing of an 'agency' as between the debtor and his vendee because that is the legal effect of the direction to pay. But in a very recent case, where the facts were similar, the Calcutta High Court has held that the creditor may maintain a suit against the

1. (1914) 26 M. L. J. 509.

purchaser (see *Dwarikanath Ash* v. *Priyanath Malki* [1]) and this will certainly be so in cases where the purchaser enters into direct relations with the creditor or, in the words of Bowstead, 'expressly or impliedly contracts' with the creditor to pay him or hold the money on his behalf (cf. *Sivasubramanya* v. *Gnana Sambanda* [2] which is not affected on this point by the Full Bench decision in *Siva Subramanya* v. *Subramanya* [3]). It does not necessarily follow that in such cases there will be a cessation of the original liability, by way of *novation*, and of course there can be none such when the direction to the vendee relates only to a part of the debt. If, as often happens, the vendee in such cases pays the amount, at his own convenience or in instalments, can the theory of agency or any other principle be applied even in those circumstances, so as to save limitation against the original debtor, by force of such payments. Except where the inference of an 'agency' is possible, the test, as stated in some of the English cases is, is such payment a payment of the original debt by a person *bound* to pay *that* debt (Cf. *Harlock* v. *Ashberry* [4]). In *Roddam* v. *Morley* [5], the expression 'party liable' was held to include any person against whom an action for the debt could be brought; and in *Lewin* v. *Wilson* [6] the Privy Council pointed out that money brought in by a stranger to the mortgage contract would not have the legal quality of *payment*; it would be a gift from a person not entitled to tender it to a person not entitled to demand it. Even where the person paying is under a liability to pay and the creditor is entitled to demand payment, the Indian cases relating to principal and surety require the further condition that the debt or liability of such person should be the *same* as that of the person against whom it is relied on to save limitation.

In *Saradacharan* v. *Durgaram* [7] the eldest of several brothers, who was also the managing member, made a payment of interest in respect of a mortgage debt incurred by their deceased father. When subsequently the creditor sued to enforce the mortgage as against all the brothers, the Court held that a fresh starting point was afforded by the payment of interest above referred to as, in making it, the eldest brother 'must be regarded as an agent'

1. (1917) 22 C. W. N 279.
2. (1911) 21 M. L. J 359.
3. (1916) I. L. R. 39 M. 997.
4. (1882) L. R 19 Ch. D. 539.
5. (1858) 1 De. G. & J. 1.
6. (1886) L. R. 11 A. C. 639.
7. (1910) I. L. R. 37 C. 461.

of the rest 'by operation of law.' But after referring to *Krishna Chandra* v. *Bhairab Chandra* [1] and *Domi Lal Sahu* v. *Roshan Dobay* [2] the learned Judges also added that they were disposed to accept the argument that the mortgage debt being binding on all the members of the family any one of them may make a payment on behalf of all. 'There is nothing in S. 20 of the Limitation Act to warrant the belief that the extended period of limitation is intended to operate only against the person making the payment.' The decision of Coxe, J. (as single Judge) in *Arjun Ram* v. *Rohima* [3] is scarcely reconcileable with this judgment and the learned Judge put it aside with the remark that 'it seems to have been a casual observation and not the decision of the Court.' We cannot quite agree with that. In the case before Coxe, J. the suit was to enforce a mortgage and a payment by the mortgagor's widow was relied on as saving limitation against the daughter's sons as well. The parties were apparently Mahomadans and on the footing that the 'widow and daughters were jointly liable to pay the debt,' the learned Judge held that the case was governed by the 'analogy' of S. 21 (2) of the Limitation Act and the decision in *Narayana Aiyyar* v. *Venkataramana* [4]. In relying on this last mentioned case, he has overlooked the distinction in operation, clearly indicated by the language of the sections, between 'acknowledgments' and 'payments.' And as for S. 21 (2), the case is at best one of 'analogy' so that other considerations are not excluded; and the well-established distinction between the position of 'joint' contractors and that of the 'co-heirs' of a *single* obligor has an important bearing on the question of the rule of limitation applicable to suits by or against such co-heirs (cf. *Ahimsa Bee* v. *Abdul*). [5] Reference may be made in passing to certain recent cases in which the question related to the effect of the acts of a Receiver. *Venkataramiah* v. *Subramanyam* [6], is a decision of a single Judge (Kumarasami Sastri, J.,) in which it was held that a payment of interest on a debt, by a receiver in a partition suit between the members of the family, he having been authorised by the court to make such payment, was sufficient to keep the debt alive against all the parties who were bound by the debts. In *Paramasivan Pillai* v. *Chakona* [7], the point arose in connection with an acknowledgment by a receiver in Insolvency. Phillips, J.,

1. (1905) I. L. R. 32 C. 1077.
2. (1906) I. L. R. 33 C. 1278.
3. (1912) 14 I. C. 128.
4. (1902) I. L. R. 25 M. 220.
5. (1901) I. L. R. 25 M. 26.
6. (1914) 26 I. C. 393.
7. (1916) 38 I. C. 169.

in the course of his Judgment, also refers to the English cases dealing with 'payments of interest' by receivers and indicates the test to be, whether, in making the acknowledgment or payment, the receiver acted *in contravention of the orders of the Court.* Oldfield, J. makes the test somewhat stricter, *viz.*, whether he acted 'under the orders of the Court.' But in any view these cases like those relating to guardians &c., proceed on the basis of an 'agency' by operation of law.

It only remains to notice *Velayudam* v. *Vythilingam* [1], where Benson and Sundara Ayyar, JJ. held that where the executant of a pro-note gave away *all* his properties to another, a payment of interest by the donor, even though made *after* the date of the gift, was operative to keep alive the right of the promisee to proceed against the universal donee as well. After referring to the language of S, 20 and to a number of cases, both English and Indian, the learned Judges add, 'Justice requires that a person who has received all the property of another without, it may be, the knowledge of his creditors, should not be at liberty to plead the Statute of limitation against them when the donor has kept the debts alive.'

Turning now to a few English cases which may help in some measure to elucidate the points raised *supra*:—We may first refer to *Forsyth* v. *Bristowe* [2]. In that case the assignee of the equity of redemption had paid interest on the mortgage-debt and in a suit on the covenant against the mortgagor, it was held that the payment by the assignee was effective to prevent the action from becoming barred. The assignee had covenanted with the mortgagor that he would himself pay the mortgage-debt and was accordingly held to be the agent of the mortgagor. It is not however quite certain whether the same view would be taken under S. 20 of the Limitation Act. (Cf. *Alagappa* v. *Subramanya* [3]). Baron Parke also referred to the circumstance that the English statute did not in terms require that payment of interest must be made by the party liable or his agent.

In *Pears* v. *Laing* [4], the material facts were these: A mortgaged a portion of his freehold V estate. He subsequently devised the whole of the V estate to F his son and his X estate to his daughters D and E. He left his other properties to trus-

1. (1912) 24 M. L. J. 66.
2. (1853) 8 Ex. Reports 716. s. c. 22 L. J. Ex. 255.
3. (1914) 26 M. L. J. 509.
4. (1871) L. R. 12 Eq. 48.

tees to pay debts including the mortgage-debt. One of the daughters D who was in possession of the X estate as devisee was till her death paying the interest on the V estate mortgage. In a suit to enforce the mortgage by sale of the mortgaged property and to have the deficiency made good out of the estate of the deceased mortgagor, it was held that the payment of interest by D sufficed to save the bar of limitation. Bacon, V. C. in his judgment cites the following passage from the judgment of Baron Parke as laying down the principle; "What we have to consider is the act of the person and not the position of the estate, for the existence or non-existence of the demand depends upon the act of the person and not upon the relative liability of the property." What is saved is the existence of the demand and not any particular remedy or kind of action. It may however be pointed out that under the English Statute on which this decision was given, the period of limitation was the same, both for the enforcement of the charge by sale and for the enforcement of the covenant as a specialty. In *Dibb* v. *Walker* [1], Chitty, J., held that a payment of interest by the tenant for life of the equity of redemption under a settlement made by the owner served to keep alive the action on the covenant as well. *Lewin* v. *Wilson* [2] turned on the effect of a payment by *one of two* mortgagors (who *inter se* however stood in the relation of principal and surety) each being separately entitled to his portion of the mortgaged property. The action was brought to enforce the obligation of the other mortgagor and the charge on his property and the Judicial Committee held that the payment by the one kept alive the remedy against the other as well, for the person paying was not a stranger but one who under the terms of the mortgage instrument was entitled to tender the whole amount of the debt and redeem the *whole* mortgage.

In *Bradshaw* v. *Widdrington* [3] the rule seems to have received a clear extension. J. E. B. mortgaged certain properties to one M but it was in fact as surety for his son. The son gave a bond to the father undertaking to pay he mortgage money himself and he accordingly made payments towards interest. The father sold a portion of the mortgaged property to another son of his, free of the mortgage, and the remaining portion was likewise sold by the father's executors. In an action against the purchasers to enforce

1. (1893) L. R. 2 Ch. 423. 2. (1886) L. R. 11 A. C. 639.
3. (1902) L. R. 2 Ch. 430.

the mortgage by sale of the property, it was held that the payment of interest by the son first mentioned was sufficient to save the action from the bar of limitation. *Newbould* v. *Smith* [1] was cited in argument but there is no reference to it in the judgment. The decision seems to have proceeded on the footing that the law will be satisfied if the payment was made by a person who as *between the mortgagor and himself* was bound to pay the debt *though not as between the mortgagee and himself*. It also holds that though the liabilities of the several parties may be different, the demand is by such payment set free as against all.

In *Howard* v *Lightfoot* [2] the question arose with reference to the effect of payment of interest by the specific devisee of part of a testator's estate in keeping alive the mortgagee's right of action against specific devisees of other parts of the real estate not subject to the mortgage. Vaughan Williams, L. J. held the principle of *Roddam* v. *Morley*, [3] to be that payment made by a person who is not a stranger to the transaction in interest binds those who are interested in the payment, to the extent of preventing the statute running. The case was followed and passages from the Judgment of the Court of Appeal quoted in *Velayudam* v. *Vythialingam* [4].

The result of the English Cases is thus stated in Halsbury's Laws of England:—'When several are at the same time jointly interested in the real estate of a debtor a payment by a devisee of part of such estate will not keep the debt out of the statute as against a devisee of another part except in cases where the debt is charged on land' (Vol. 19, p. 81). 'Payment of interest on a mortgage debt by a devisee of the mortgaged lands keeps alive the right of the mortgagee to resort to the residuary personal estate or the other real estate of the testator in the event of the security of the mortgaged lands proving insufficient' (Ibid. p 96.) As to the rights of simple contract creditors to enforce payment out of the real estate of a deceased debtor. 'payment by the heir or devisee will not bind the personal representative nor will payment by the latter, if he has divested himself of such estate, bind the heir or devisee. * * * * A payment by the devisee of the real estate of a deceased debtor or of part of it, in respect of a debt of his testator keeps the creditor's right alive as against all persons interested in

1. (1886) 33 Ch. D. 127.
2. (1907) L. R. 1 Ch. 330.
3. (1858) 1 De. G. & J. 1.
4. (1912) 24 M. L. J. 66,

the real estate. It seems that, if the right of a simple contract creditor against personalty is kept alive by payment of interest by executors the indirect right against the land by means of marshalling is also kept alive'. (Ibid. p. 74).

The principle as stated in *Howard* v. *Lightfoot* [1] is obviously wider than the language of S. 20 of the Indian Limitation Act and Mr. Rustomjee thinks, not without reason, that *Velayudam* v. *Vythialingam* [2] goes too far. On the question of the effect of payment by a principal debtor or surety in keeping alive the creditor's remedy against the other, three of the Indian High Courts have declined to follow the decision in *Allison* v. *Frisby* [3]. It remains to be seen how far Courts in India will follow English rules or precedents in dealing with the several classes of cases indicated in the course of this article.

SUMMARY OF ENGLISH CASES.

Nye *v.* **Niblett**: (1918) 1 K. B. 23.

Malicious Damage Act, 1861, S. 41—Malicious killing of animals—Animal ordinarily kept for a domestic purpose—Proof that a particular animal was so kept or was property of another person—Whether necessary.

S. 41 of the Malicious Damage Act provides that whosoever shall unlawfully and maliciously kill any animal not being cattle, but being ordinarily kept for any domestic purpose shall be guilty of an offence. Under the above provision, 3 boys were charged for having killed two cats in circumstances of great cruelty. No evidence was given on behalf of the prosecution to prove the ownership of the cats or to show that they were being kept for domestic purposes.

Held, the section only means that if you kill unlawfully and maliciously an animal which though not the subject of larceny belongs to a class of animals which as a class are ordinarily kept in a state of confinement or for domestic purposes then the offence is committed and that in such a case it is not necessary to prove who owned the particular animal so killed or that the particular animal was ordinarily kept in confinement or for some domestic purpose.

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1. (1907) L. R. 1 Ch. 330.
2. (1912) 24 M. L. J. 66.
3. (1889) L. R. 43 Ch. D. 106.

Repton School Governors *v.* **Repton Rural Council**: (1918) 1 K. B. 26.

By-laws—Reasonableness of—Local Government—Building by-laws—Airs-pace at rear of new building—Public Health Acts Amendment Act, 1907, S. 23.

S. 23 of the Public Health Acts Amendment Act, 1907 provides that "for the purposes of this Act and the Public Health Acts, and any by-laws made thereunder, each of the following operations, namely :—

"(*a*) The making of any addition to an existing building by raising any part of the roof, by altering a wall, or making any projection from the buildings but so far as regards the addition only shall be deemed to be the erection of a new building".

By-law 12 framed under the Act provided that every person erecting a new domestic building should provide in the rear of such building an open space of not less than 150 square feet.

On a question raised as to the unreasonableness of by-law it was held that the by-law was unreasonable and as such bad if the effect in a given case which might be of frequent occurrence of construing a by-law in a particular way would lead to a result quite unnecessary for the protection of the Public Health and would impose a serious restriction upon the ordinary rights of a property owner with no good object, one would be entitled to say that the by-law is void, because it is unreasonable: one must be careful to see that the result is such as no one would desire and would in itself be absurd; but if it is found to be so, one is entitled and bound to say that such a by-law is bad for unreasonableness.

China Mutual Steam Navigation Company *v.* **Mlacay**: (1918) 1 K. B. 33.

Defence of the Realm Regulations 39, B. B. B.—Shipping controller—Duties and powers—Shipping—Requisition—Action against public officer in his official capacity.

The shipping controller by the new Ministries and Secretaries' Act 1916 has such powers as may be conferred on him by regulations under the Defence the Realm Consolidation Act 1914. By Regulation 39 B. B. B. the shipping controller may requisition or require to be placed at his disposal any ships in order that they may be used in the manner best suited for the needs of the

country and may require any requisitioned ships to be delivered to him at such times and places as he may require.

The shipping controller sent a letter under the above regulation to shipowners stating, (*a*) the steamers were requisitioned (*b*) the owners were to work them exactly as if they were still running in their own account, (*c*) and they were to run them in fact for the Government accounting to the Government for all net profits. In an action against the shipping controller for a declaration that notwithstanding the above letter the voyage was on account of the plaintiffs, the shipowners and that the plaintiffs were entitled to receive and retain the profits of such voyage: *held,* (i) that the regulation was not *ultra vires* the Defence of the Realm Act. (ii) The shipping controller has no power to requisition the services of the owners. The letter is *ultra vires* in this essential respect and cannot be supported. (iii) An action will lie against the shipping controller as defendant, though he is an officer of the State when his conduct is in question.

JOTTINGS AND CUTTINGS.

The Bolshevists and the Law:—Lawyers! Peter the Great is said to have exclaimed when he was told that the busy throng whom he saw in Westminster Hall were lawyers, 'why, I have only in my whole dominion, and I design to hang one of them the moment I get home!' An even stronger dislike of all things legal has been displayed by the Bolshevists. 'The Extremists' says two one of Reuter's correspondents in Russia, 'have abolished all the existing Law Courts, and also the Bar'; and from the same source has come the supplementary announcement that 'the Commissioners of the people intend to set up Law Courts comprising soldiers, sailors, workmen and workwomen, from among those most devoted to the people.' Revolutionaries seldom fail to allow their hatred of existing institutions to extend to Judges and Advocates. 'The first thing we do,' said Jack Cade, 'let's kill all the lawyers.' That, in some degree or other, is invariably the attitude of those who are opposed to law and order, but it is an attitude which the revolutionist never fails to abandon when he succeeds in re-constructing the society of which he forms a part. Scarcely less regard was paid to legal institutions in the

French Revolution, but out of that fierce confusion there eventually emerged, under the strong guidance of Napoleon one of the greatest codes of law the world has known. Although the Bolschevists, in their eagerness to destroy, have abolished the Courts and the Bar, the Russian cataclysm may eventually be followed, not only by a restoration of the only means by which the rights of citizens may be determined, but also by a legal code that will materially assist the administration of justice in a country which hitherto has not been conspicuous for the certainty or equality of its laws.—*The Law Journal.*

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The Supremacy of the Law :—Lord Robert Cecil, speaking last Sunday at the great Zionist demonstration on the Government's declaration of policy for Palestine, put in a new form the common description of the two main foundations upon which the policy of this country has always been based—liberty and justice. 'Perhaps', said he 'they might be more accurately called liberty and the supremacy of the law.' And like the sound constitutional lawyer and student of history that he is, he claimed that, if we are ever to obtain that security which we have recently been told is so all-important to us, 'it must be by the same means by which we have secured liberty and happiness in our country, namely by the supremacy of the law.' That was well said, and lawyers will welcome the declaration. It gives the law—fixed law, and not any nebulous idea of justice—its rightful place in the scheme of civilization, and adds a new dignity to its study and its practice.—*Ibid.*

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The Remuneration of Solicitors :—While the Council of the Law Society are seeking to obtain an increase in Solicitors' charges during the war—an increase, it is understood, of 25 per cent—the Committee of the Liverpool Law Society, while sympathising with this endeavour to obtain a war bonus, are raising the question of a permanent change in the principles on which the remuneration of solicitors is based. One of their main proposals is that the system of remuneration by scale charges should be extended. They claim that

"From the Solicitors' point of view the system saves labour and trouble, and will, on the whole, prove more remunerative by abolishing the anomaly that remuneration should depend, not on the values involved, but on the length of documents and number

of interviews necessary in a particular matter. It is believed also that it will prove acceptable to clients by substituting for an uncertain charge, a charge varying according to value involved. The system is also the one familiar to the client in the case of almost all other professional and business charges."

We agree with the President of the Liverpool Law Society a report of whose presidential address will be found in another column, that it is absurd that the remuneration of a solicitor should still largely depend upon the prolixity of the documents he draws—a brief, for example—rather than upon the skill he exercises and the importance of the matters with which he has to deal. The supreme merit of *ad valorem* charges is that a client knows exactly how much he will have to pay. It is not so much the costliness of legal proceedings as the uncertainty of their cost that deters so many members of the public from resorting to them. How very absurd the present system it has been aptly pointed out by Master King in the preface to his work on "Costs on the High Court Scale."

"Costs are a peculiarly British institution. No other country pays its lawyers in the same fashion, and in particular no other country has such an extraordinary difference in the mode of payment between men who think and the men who talk, between the men whom the suitors see and the men to whom the Judges listen. Nor is this distinction the only peculiarity in our mode of legal remuneration. Under it, through various causes, but principally from an inordinate application of the maxim, *via trita via tuta*, solicitors are largely dependent for their living upon the allowances which are framed upon the paradoxical principle of paying them for things they don't do by way of compensation for not paying them for things they must do."

Although, as the President of the Liverpool Law Society has pointed out, the system of remuneration in conveyancing matters was changed in the midst of the Napoleonic wars, yet it can hardly be expected that a radical change in the principle of remuneration, both in contentious and non-contentious matters, could be introduced during the present war, but it will certainly form a fitting part of the legal reconstruction that will come with peace, and the Committee of the Liverpool Law Society are rendering a useful service in affording the profession an opportunity of formulating their ideas on the subject.—*The Law Journal.*

The Kaiser and Lawyers.—At the Lawyers' Club in New York on December 15, Mr. Gerard, the former Ambassador in Berlin, told an interesting anecdote illustrating the contempt which the German Emperor entertains for lawyers. In a notable interview the Kaiser took the opportunity to express to Mr. Gerard his hatred and contempt of them. "After shaking his finger in my face," said Mr. Gerard, "and telling me he would stand no nonsense from America after the war" the Monarch shouted, "All the people who are opposed to me are lawyers. Lloyd George, Asquith, Poincare—they are all lawyers."—*Ibid.*

CONTEMPORARY LEGAL LITERATURE.

The *November* issue of the *Harvard Law Review* is devoted to the remarkable article of M. Duguit on Law and State. It is a powerful protest against the current doctrines of State. The writer examines in succession, the conceptions of State according to Rousseau, to the declaration of the rights of man and citizen of 1789, according to the German and French Metaphysical schools as well as the realistic schools of the same countries and shows their utter inadequacy. State according to Rousseau is omnipotent and the way in which he reconciles that omnipotence with the freedom of the individual does not in any way affect its omnipotence. The restrictions imposed by the State upon the individual are according to him, not really restrictions because those restrictions are imposed by the individual upon himself though no doubt, in association with others as units of the organisation known as State. This extreme view in its totality was accepted by French writers of no school but it found favour with the German Philosophers like Kant and Hegel and German jurists like Jhering and Jellinek. Though a certain class of French thinkers do agree with these in looking upon the State as a natural organism or person, they consider the rights and powers of the State as being subject to certain inalienable and indefeasible rights of the individual. This idea is thus expressed in the declaration of rights of 1789: "The end of all political association is the conservation of the natural and indefeasible rights of man." Though some of the jurists of the German Metaphysical school that is to say, according to the terminology of the writer the school

that regards State as a person or organism, recognise the limitations, the later and the more recognised jurists do not seem to recognise any such, except in so far as the State itself chooses to recognise in its wisdom dictated by necessity or enlightened egotism The influence of this school has led to the moral bankruptcy of Germany exhibited in her international relations during the present war. The German realistic school headed by the Bavarian writer Seydel repudiates the idea of personality imputed to the State which it regards a mere metaphorical expression and looks upon the State merely as a political association of individuals for a distinct end but even that school asserts the omnipotence of the State. The present day French writers like Mr. Benvist and Esmaine whose views, M. Duguit claims to perfect repudiate equally the idea of Sovereignty and Omnipotence. M. Duguit throws overboard all notions of subjective right, autonomy of the individual and sovereignty of the State. As Auguste Comte wrote "each has duties in relation to all; but no one has any right properly so called. In other words no one possesses any other right than that of always doing his duty." Neither has the State a subjective right to command nor have the individuals subjective rights of liberty and property but all the governing and the governed are submitted to the jural principle, founded on social interdependence and by the application of this jural principle all individual wills—the wills of those who govern as well as the wills of those who are governed —find themselves placed in a certain situation which we call, an objective or legal situation, implying in a general way the obligation upon every one to co-operate according to his position in the maintenance of social solidarity and to do nothing which constitutes an interference with it. Positive law cannot derive its obligatory force from a supposed commanding power of those who govern. Positive law is imperative when it realises the jural principle or puts it into practice; it is imperative only when it has the one or the other of these two characteristics which indeed are only one and only in the measure that it has them. State is a differentiated Society in which the strongest must employ the force at their disposal to assure the accomplishment of certain services for the benefit of all. The will of those who govern has no force as such; it has value and force only to the extent that it makes for the organisation and the functioning of public service. Thus, the notion of public service comes to replace

that of sovereignty. The State is no longer a sovereign power which commands ; it is a group of individuals having in their control forces which they must employ to create and to manage public service. The notion of public service becomes according to this theory the fundamental notion of modern public law. The writer of a note on M. Duguit's article in the *Review* says that the views of M. Duguit have excited comment in a manner almost unprecedented. It has divided the lawyers whose work verges on political speculation into hostile camps. Some fiercely deny its truth either as a statement or induction and urge that it would result in anarchy while others like M. Berthelemy have not hesitated to adopt alike its methods and conclusions. Others again seem to reach not very different results by very different methods. A whole school of legal thinkers are clearly influenced by the speculations of the writer. Undoubtedly the writer's views are highly interesting and, if accepted, should profoundly affect many an accepted political opinion in England and elsewhere.

BOOK REVIEWS.

THE INDIAN STAMP ACT, *by Desai Narotam, 3rd edition, Price Rs. 9.*

We have great pleasure in announcing the publication of the 3rd annotated edition of the Indian Stamp Act by Mr. Desai Narotam, pleader, High Court, Bombay. The book under review is so well known to the legal public that it does not require many words from us in commending it. We would only draw the attention of our readers to the fact that in the present edition the amendments of the Act, notes of cases, rules, notifications etc. have been brought down to the end of 1917.

THE PROVINCIAL SMALL CAUSE COURTS ACT, *by K. J. Rustomji, published by Butterworth & Co. Price Rs. 6.*

It is with great pleasure that we inform the members of the Bench and the Bar of the publication of the Commentaries on the Provincial Small Causes Courts Act, by Mr. Rustomji, the well known author of 'Indian Law of Limitation which has within so

short a time taken the foremost place among the up-to-date Commentaries on the Limitation Act. We have carefully gone through some portions of the volume under review, and we can confidently say that it maintains the high standard of accuracy which has been associated with the name of the author. It is hardly necessary to mention that the cases have been subjected to careful criticism wherever necessary and the author has made useful suggestions of his own on many points. The case law has been brought down to the end of October 1917. We have every reason to believe that this book will find a prominent place in the library of all lawyers and judges.